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Despite the coming of the war, the REVIEW wishes to announce that every effort will be made in the fall to carry on the work. Abandonment of this plan may prove necessary but at present the situation seems distinctly hopeful. In this exigency we are dependent more than ever before upon the continued loyalty of our contributors and subscribers.

NOTES.

LIBERTY OF CONTRACT AND SOCIAL LEGISLATION.—The Supreme Court, in passing upon the constitutionality of social legislation, is faced not only with the problem of deciding the case at issue, but of guiding the course of future social legislation, a task obviously of vital importance because of the effect upon the whole economic and industrial development of the country. For this reason, if for no other, the Court must be extremely slow to condemn acts which have received the sanction of the elected representatives, and should apply most rigidly the well established test that such acts are not to be condemned unless palpably arbitrary and clear violations of the rights of liberty and property guaranteed by the Constitution.[1] The influence of

[1]Minnesota *v.* Barber (1890) 136 U. S. 313, 320, 10 Sup. Ct. 862; Jacobson *v.* Massachusetts (1905) 197 U. S. 11, 31, 25 Sup. Ct. 358; Gundling *v.* Chicago (1900) 177 U. S. 183, 188, 20 Sup. Ct. 633.

precedent upon subsequent decisions is too well known to require comment. Indeed, despite the fact that it should probably have less weight in constitutional law than in any other legal field, owing to the constantly changing social and industrial conditions, and the consequent frequent need of new restrictions,[2] it is the universal reluctance of all courts to depart from precedent which has undoubtedly been one important element in retarding the enactment of much vitally needed legislation.[3]

There is, however, a much more fundamental reason why the courts should approach the determination of such a question with extreme caution. Although it has been laid down time and again that the exigency is for the legislature alone, and that the only function of the court is to determine whether there has been an abuse of power,[4] it is coming to be recognized more and more that the constitutionality of many statutes, and particularly of those involving social legislation, depends solely upon questions of fact, and that what the court is passing upon, in the last analysis, is in reality the wisdom of the legislation.[5] Moreover, these questions of fact are obviously dependent upon conditions concerning which the court can know but little, and it was probably the realization of this which was a large factor in the establishment of the doctrine that all doubts must be resolved in favor of the legislation.[6] Even with the establishment of this doctrine, however, the result could hardly be called satisfactory. Courts are extremely

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[2]"In dealing with legislation of this sort the court can make far less use of precedent than in ordinary cases. Freedom in its concrete manifestation is a variable term, and each application must be tested with reference to the then existing conditions". 14 Michigan Law Rev. 325, 328.

[3]"Jurisprudence is last in the march of sciences away from the method of deduction from predetermined conceptions". Roscoe Pound, Mechanical Jurisprudence, 8 Columbia Law Rev. 605, 610. Thus Lochner *v.* New York (1905) 198 U. S. 45, 25 Sup. Ct. 539, has been repeatedly cited to obstruct social legislation. See Adair *v.* United States (1908) 208 U. S. 161, 173, 174, 28 Sup. Ct. 277; State *v.* Miksicek (1910) 225 Mo. 561, 567 *et seq.*, 125 S. W. 507; Commonwealth *v.* B. & M. Ry. (1915) 222 Mass. 206, 110 N. E. 264. See also Roscoe Pound, Liberty of Contract, 18 Yale Law Journal, 454, 480, in criticism of Lochner *v.* New York.

[4]Chicago, B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 31 Sup. Ct. 259; Erie R. R. *v.* Williams (1914) 233 U. S. 685, 34 Sup. Ct. 761.

[5]" * * * Now these questions must be more and more decided by passing in review the same public and political questions with which the legislature itself has dealt". J. G. Palfrey, The Constitution and the Courts, 26 Harvard Law Rev. 507, 517; see also Ernst Freund, Constitutional Limitations and Labor Legislation, 4 Illinois Law Rev. 609; Learned Hand, The Eight Hour Day, 21 Harvard Law Rev. 495, 499; People *v.* Klinck Packing Co. (1915) 214 N. Y. 121, 127-8; McLean *v.* Arkansas (1909) 211 U. S. 539, 549-50, 29 Sup. Ct. 206; Bosley *v.* McLaughlin (1915) 236 U. S. 385, 392 *et seq.*, 35 Sup. Ct. 345. In this connection it is interesting to note the frequency with which the criticism, that it is not within the power of the court to consider the exigency, appears in dissenting opinions in cases in which such legislation is held unconstitutional. This would seem to indicate that the dissenting judges, at least, believed that the court was usurping the power of the legislature. See dissenting opinions in Lochner *v.* New York, *supra;* Adair *v.* United States, *supra;* Coppage *v.* Kansas (1915) 236 U. S. 1, 35 Sup. Ct. 240.

[6]This doctrine is well stated in Price *v.* Illinois (1915) 238 U. S. 446, 452, 35 Sup. Ct. 892; see also Hadacheck *v.* Los Angeles (1915) 239 U. S. 394, 413, 36 Sup. Ct. 143.

loath to abandon their decision of an issue, after it has been presented to them for review and which it is their function to pass upon, and to assume that the legislature did its work properly, and that their own belief in the law's invalidity must, if there are grounds for a difference of opinion, necessarily be wrong.[7] Consequently, as it is necessary under our system of government for the judiciary to review the work of the legislature, it is most important, for the sake of the establishment of sound social legislation, that the facts, in their vitally important economic aspect, be authoritatively presented to the court. And in the absence of any administrative provision for such presentation,[8] the duty necessarily devolves upon the counsel handling the case. This policy has been pursued in a few more recent cases.[9]

That legislation of this type does constitute a taking of property or a restriction on the absolute freedom of contract can hardly be questioned. However, it is still necessary for the court to consider whether the resultant public benefit does not warrant the infringement.[10] It is coming more and more to be realized that this dispute over freedom of contract, which appears in practically every case of social legislation, involves a much more important question than the rights of the individual, that the whole economic and industrial development of the country is inextricably bound up in a simple contract of this type, and that in any well organized and progressive government the rights of the individual must be subordinated to the welfare

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[7]That judges frequently allow their personal economic views to influence their decisions has long been recognized as a difficulty. See dissenting opinion of Mr. Justice Holmes in Lochner *v.* New York, *supra.*

[8]See John G. Palfrey, *op. cit.* 525 *et seq.*, where it is suggested that a separate tribunal be created to aid the court in reviewing legislation by assembling scientific data concerning the need of the legislation questioned.

[9]See the comment by the Court on the presentation of the case in Muller *v.* Oregon (1908) 208 U. S. 412, 419, 28 Sup. Ct. 324; see also the briefs in the following cases: Muller *v.* Oregon, *supra*; Miller *v.* Wilson (1915) 236 U. S. 373, 35 Sup. Ct. 342; Bosley *v.* McLaughlin, *supra*; Stettler *v.* O'Hara (1914) 69 Ore. 519, 139 Pac. 743.

[10]The validity of such statutes is always contested under the Fifth and Fourteenth Amendments. That freedom as there used involves freedom of contract is settled. Allgeyer *v.* Louisiana (1897) 165 U. S. 578, 17 Sup. Ct. 427. However, it is equally well settled that freedom, as protected by the Constitution, is not absolute if the public need requires otherwise, Jacobson *v.* Massachusetts, *supra*; Bacon *v.* Walker (1907) 204 U. S. 311, 27 Sup. Ct. 289; see Lochner *v.* New York, *supra,* as in such cases the restraint is imposed under the police power and not without due process of law. See notes 18, 19, *infra.* It is of course established and has been asserted in rather over vigorous fashion that the legislation abridging it must be reasonable, Adair *v.* United States, *supra*; Lochner *v.* New York, *supra,* but the courts have and should allow great latitude in asserting what is reasonable where health, Jacobson *v.* Massachusetts, *supra,* safety, *cf.* Johnson *v.* Southern Pac. Co. (1904) 196 U. S. 1, 25 Sup. Ct. 158, and general welfare, Schmidinger *v.* Chicago (1913) 226 U. S. 578, 33 Sup. Ct. 182, are involved. Consequently, within wide limits public policy will allow a taking of property, Chicago B. & Q. R. R. *v.* Drainage Com'rs. (1906) 200 U. S. 561, 26 Sup. Ct. 341; Noble State Bank *v.* Haskell (1911) 219 U. S. 104, 31 Sup. Ct. 186, or a limitation of the freedom of contract. Holden *v.* Hardy (1898) 169 U. S. 366, 18 Sup. Ct. 383; Chicago B. & Q. R. R. *v.* McGuire, *supra*; Schmidinger *v.* Chicago, *supra.*

of the public at large.[11] Only with the complete realization of this fact will the rights of the individual, as vital as they undoubtedly are, be relegated to their proper level of importance in judicial consideration.[12]

Moreover, in considering the application of the constitutional guarantees to any agreed state of facts, it is necessary for the court to consider whether such legislation cannot be upheld on the ground that it creates, rather than destroys, a condition under which a real freedom of contract can exist.[13] Despite many early decisions to the contrary,[14] it is now well established that the passing of measures which tend to level the inequalities of fortune is a legitimate field for legislation, and that a man may, at the expense of his liberty, be prevented from making contracts which are detrimental to his own welfare.[15] This was undoubtedly borne of a realization that the absence of legislation could, in effect, defeat the enjoyment of those rights guaranteed by the Constitution just as effectively as legislation which arbitrarily and unjustifiably restricted the enjoyment of them.[16]

The constitutionality of such statutes as appear in the cases of *Stettler* v. *O'Hara* (1914) 69 Ore. 517, 139 Pac. 743 (aff'd., U. S. Sup. Ct., Oct. Term, 1916, April 9th, 1917, without opinion owing to an evenly divided court), and *Bunting* v. *Oregon* (1917) 37 Sup. Ct. 435, must be determined in accordance with the foregoing principles. In the first of these cases a statute providing for a minimum wage for women in the state of Oregon was upheld; in the other the Court held valid a law prohibiting the employment of men in certain industries for more than ten hours daily. Both statutes were decided to be reasonable exercises of the police power and hence no violation of the Fourteenth Amendment. Due process as used in that and the Fifth Amendment must perforce remain a vague and undefined term. That

[11]See People *v.* Klinck Packing Co., *supra*, 127-8; Price *v.* Illinois, *supra*; Edward A. Adler, Labor, Capital, and Business at Common Law, 29 Harvard Law Rev. 241.

[12]"Under a judicial system which has for centuries magnified the sacredness of individual rights, there is much less danger of doing injustice to the individual than there is in overlooking the obligations of those in authority to organized society." People *v.* Strollo (1908) 191 N. Y. 42, 69, 83 N. E. 573.

[13]" * * * Necessitous men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose upon them". Vernon *v.* Bethell (1762) 2 Eden 110, 113.

[14]State *v.* Fire Creek Coal & Coke Co. (1889) 33 W. Va. 188, 10 S. E. 288; Ritchie *v.* People (1895) 155 Ill. 98, 40 N. E. 454; State *v.* Haun (1899) 61 Kan. 146, 59 Pac. 340.

[15]Holden *v.* Hardy, *supra*; Muller *v.* Oregon, *supra*; Knoxville Iron Co. *v.* Harbison (1901) 183 U. S. 13, 22 Sup. Ct. 1; see also Richard Olney, Discrimination against Union Labor—Legal?, 42 American Law Rev. 161, for a criticism of Adair *v.* United States, *supra*, and dissenting opinion of Mr. Justice Holmes in Coppage *v.* Kansas, *supra*. Moreover, usury laws, the constitutionality of which has never been questioned, and legislation regulating the contracts of seamen as to wages, Patterson *v.* The Bark Eudora (1903) 190 U. S. 169, 23 Sup. Ct. 821, are admirable examples of legislation which restricts liberty of contract in protecting one class against the oppression of another.

[16]See Roscoe Pound, Liberty of Contract, 18 Yale Law Journal, 454.

it has never been the subject of express definition[17] would seem to point to the fact that the Court realized that it was more or less dependent upon conditions which were constantly changing. In the realm of decided cases it may fairly be said that the constitutionality of legislation, restricting the hours of labor of women in all industries,[18] and of men in dangerous and unhealthy occupations,[19] is established. However, so far as any distinction between men and women is concerned, it is obvious that such distinction is simply a matter of degree. If women are unable to labor more than eight hours a day and retain their health, it certainly is not unreasonable to suppose that there must be a limit beyond which man cannot labor without suffering a corresponding detriment, and this irrespective of the occupation in question, though the exact number of hours would undoubtedly vary according to occupation. Moreover it is difficult to see why the constitutionality of a statute establishing a minimum wage is not to be determined by the same standards which are decisive in the consideration of an hours law. Certainly a fair living wage is just as necessary to the maintenance of health as a restraint on the hours of labor. And it is submitted that, even though the statute causes a diminution of investment returns *after they have accrued,* such an exercise of the legislative power to further the public welfare is not, merely for that reason, any more a taking of the employer's property without due process than is a restraint on the number of hours of labor.

PATENT RIGHTS AND THE ANTI-TRUST LAWS.—An analysis both of the rights granted under the patent laws and of the limitations imposed by the Sherman[1] and Clayton[2] Laws is necessary before the border line cases, involving the inevitable conflict between a statute granting monopoly and those curbing it, can be intelligently discussed.

On the one hand, it is unquestioned that patent monopolies under certain circumstances are sanctioned under the laws, but the true nature of the right is often misunderstood. A patentee acquires only the right to exclude others from making, using, or vending the article embodied in his patent.[3] The right to make, use, and sell he already has before acquiring his monopoly. These three rights of exclusion may be separately or together relaxed by the patentee so that others may enjoy partially the benefit of the monopoly.[4] It was originally considered that, as the patentee might withhold his patent altogether from the public,[5] he might grant it on any terms, no matter

[17]See Davidson *v.* New Orleans, *supra*; Freeland *v.* Williams (1889) 131 U. S. 405, 9 Sup. Ct. 763; Brown *v.* New Jersey (1899) 175 U. S. 172, 20 Sup. Ct. 77.

[18]Muller *v.* Oregon, *supra*; Ritchie & Co. *v.* Wayman (1910) 244 Ill. 509, 91 N. E. 695; Miller *v.* Wilson, *supra.*

[19]Holden *v.* Hardy, *supra*; Baltimore & O. R. R. *v.* Int. Com. Comm. (1911) 221 U. S. 612, 31 Sup. Ct. 621; State *v.* Cantwell (1904) 179 Mo. 245, 78 S. W. 569.

[1]26 Stat. 209 (1890).

[2]38 Stat. 730 (1914).

[3]Patterson *v.* Kentucky (1878) 97 U. S. 501; see Bloomer *v.* McQuewan (1853) 55 U. S. 539.

[4]*Cf.* Adams *v.* Burke (1873) 84 U. S. 453.

[5]Paper Bag Patent Case (1908) 210 U. S. 405, 28 Sup. Ct. 748.